84-1483

No. _____

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IN THE

Supreme Court of the United States

October Term, 1984

YUGOEXPORT, INC. (JUGOEXPORT)
AND INSURANCE INSTITUTION "NOVI SAD",
Petitioners,

v.

THAI AIRWAYS INTERNATIONAL, LTD
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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60 pp

QUESTIONS PRESENTED

1. Whether impairment of the foreign policy objectives of the United States and the humanitarian aims of the United Nations, together with financial loss to parties with New York offices constitutes a "direct effect in the United States" so as to invoke jurisdiction under the Foreign Sovereign Immunities Act.

2. Whether the Royal Thai Government's default in the Southern District of New York precludes a collateral challenge of the resulting judgment.

PARTIES TO THE PROCEEDINGS

The parties having an interest in the outcome of this case, pursuant to Rule 21.1(b) of the Rules of the Supreme Court, are listed in order that the Justices of this Court may evaluate possible disqualification or recusal, and are as follows:

1. Yugoexport, Inc. (Jugoexport)

2. Insurance Institution "Novi Sad"

3. Socialist Federal Republic of Yugoslavia

4. Thai Airways International, Ltd.

5. Port Authority of Thailand

6. Royal Thai Government

7. The United Nations

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YUGOEXPORT, INC. (JUGOEXPORT)
AND INSURANCE INSTITUTION "NOVI SAD",
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v.

THAI AIRWAYS INTERNATIONAL, LTD
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Yugoexport, Inc. (Jugoexport), and Insurance Institution "Novi Sad", respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 26, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit of which review is sought, was issued December 26, 1984. The opinion, reported at 749 F.2d 1373 (1984), is printed as Appendix D. The proceedings below prior to that opinion were as follows:

On October 5, 1978, a default judgment was entered by the U.S. District Court for the Southern District of New York against defendant Port Authority of Thailand. Judgment in the sum of $856,069.21, together with interest at the rate of 6% per annum from August 2, 1976 was entered on October 31, 1979. Said judgment is printed as Appendix A.

Petitioners subsequently filed a Motion for Writ of Garnishment of the Assets of Thai Airways International, Ltd. That motion was denied by the court by Order entered March 8, 1984, printed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 26, 1984. This petition for Writ of Certiorari was filed within ninety (90) days of that date, 28 U.S.C. 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) is pertinent to this case.

> "(a)" A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;"

STATEMENT OF THE CASE

In February, 1978, Yugoexport, Inc., (hereinafter "Yugoexport") and Insurance Institution "Novi Sad," filed an action in the Southern District of New York against the Port Authority of Thailand to recover the value of a shipment of foodstuffs which were damaged in 1976 while stored in Bangkok, Thailand, at the in-transit warehouse operated by the Port Authoirty of Thailand. The goods were in transit to their ultimate destination, Vientian, Laos. The shipment in question was the Yugoslavian Government's contribution to the United Nations Laotian Relief Fund. The United Nations was and is headquartered in New York.

The plaintiffs, petitioners herein, are agencies and instrumentalities of the Socialist Federal Republic of Yugoslavia, and the petitioner, Yugoexport, maintains an office in New York. The Port Authority, an agency of the Royal Thai Government, also has an office in New York.

The New York action was brought pursuant to the provisions of 28 U.S.C. 1330 and 28 U.S.C. 1602 *et seq.*, the *Foreign Sovereign Immunities Act of 1976*, (hereinafter "FSIA"). All the procedural prerequisites for service of process set forth in the Act were satisfied, including the translation of the documents into Thai. The complete procedural history of the New York action is set forth in the Affidavidit of Regularity, reproduced in Appendix B. The Thai Government, through the Port Authority, failed to appear or answer and default was entered. After an inquest before the court, judgment was granted to the petitioners in the sum of $856,069.21 with interest and costs.

Thereafter, the petitioners registered the New York judgment in the Western District of Washington at Seattle where commercial assets of the Thai Government's airline are situated and applied for a Writ of Garnishment based on said judgment against the accounts of Thai Airways International, Ltd. (hereinafter "Thai"). The shares of Thai are virtually wholly owned by the Royal Thai government and Thai is an agency or instrumentality of the Royal Thai government within the purview of the FSIA.

The Western Washington District Court denied petitioner's request, finding that the cargo loss had no direct effect in the United States, pursuant to 28 U.S.C. 1605(a)(2), and, Thai Airways' assets were therefore immune from execution by virtue of 28 U.S.C. 1609. The court assumed, without holding, that the New York District Court had the requisite subject matter jurisdiction to render a valid enforceable default judgment.

On appeal, the Ninth Circuit affirmed the district court, conceding that it had adopted a very restrictive interpretation of the "direct effect" language of 28 U.S.C. 1605(a)(2). However, the Ninth Circuit went beyond the district court ruling and found that the New York district court had no jurisdiction of the subject matter under the FSIA.

The Ninth Circuit's decision is in conflict with the more liberal trend of the Second Circuit, thereby creating a divergence of opinion between the circuits and ignoring the prior equitable philosophy of this Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. There Is A Conflict Between Circuits Regarding Interpretation of The "Direct Effect" Clause.

This court established in *Verlinden B.V.* v. *Central Bank of Nigeria*, _____ U.S. _____, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), that the FSIA provides both statutory subject matter jurisdiction and personal jurisdiction, so long as one of the exceptions to sovereign immunity set forth in 28 U.S.C. § 1605-1607 applies. The court further found in *Verlinden, supra*, that the Act indicated no intention on the part of Congress to limit access to the courts based upon the citizenship of the plaintiff.

The FSIA has been characterized as a "vaguely-worded statute whose draftsmen deliberately left decision of many difficult questions to the federal courts." *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 302-03 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). One area in which the district courts and the various circuit courts of appeal have had considerable difficulty is the breadth to be given the several exceptions to sovereign immunity set forth in 28 U.S.C. § 1605(a)(2), and in particular, the third clause, which provides an exception to sovereign immunity in any case in which the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a "direct effect in the United States . . ."

A serious conflict has developed between the Second and Ninth Circuits as to what constitutes a "direct effect in the United States" in order to invoke jurisdiction under the FSIA. It is petitioners' position that the restrictive Ninth Circuit interpretation renders the exception virtually meaningless, while the more liberal interpretation of the Second Circuit gives effect to the spirit and intent of the legislation. A Supreme Court resolution of the existing conflict is critical and will fulfill the purpose of the Act and bring uniformity and regularity to this sensitive area of the law.

The legislative history of the FSIA reveals that an avowed principal purpose of the bill was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch . . . where sovereign immunity decisions are made exclusively by the courts . . ." H. R. REP. No. 1487, 94th Cong. 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 6603, 6606.

This court has noted the increased participation by foreign sovereigns in the international marketplace and has recognized the necessity for requiring a waiver of sovereign immunity in this context:

> The potential injury to private businessmen — and ultimately to international trade itself — from a system in which some of the participants in the international market are not subject to the rule of law has therefore increased correspondingly. . . . In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very strongly on "national nerves."

Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 426 U.S. 682 (1976).

The increasing presence of foreign sovereigns in the international marketplace will have significant detrimental effect so long as those participants are allowed liberality in the use of the shield of sovereign immunity. The protected sovereigns can reap the benefits and profits of the marketplace without assuming the obligations and liabilities that other participants must assume. In many cases, the foreign state is in a position to establish itself as a monopolistic enterprise, depriving the consumer of a free choice of providers as well as a remedy should the goods or services prove to be less than satisfactory. The FSIA sought, in part, to remedy this inequity and to provide access to the courts for those aggrieved by the commercial acts of a foreign state.

That the instant case involves a commercial activity is not disputed. The entity involved in the initial New York action, the Port Authority of Thailand, is an agency of the Royal Thai Government which operates warehouse facilities in the Port of Bangkok, Thailand. This is clearly an activity in which a non-government entity might engage. The only dispute is whether the loss of the Laotian Relief shipment had a "direct effect in the United States." The Ninth Circuit erroneously, and without explanation, answered this question in the negative.

The Ninth Circuit's restrictive approach to the "direct effect" language conflicts with the more liberal interpretations of the other circuits as well as the spirit of the FSIA itself. Furthermore, the Ninth Circuit's reasoning for its holding in the case at bar, is based on the principles of personal injury and wrongful death as espoused in *Harris* v. *VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979), and *Upton* v. *Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), *aff'd without opinion* 607 F.2d 494 (D.C.Cir. 1979), as adopted in *Berkovitz* v. *Islamic Republic of Iran*, 735 F.2d 329 (9th Cir. 1984), a case dealing with a political murder. This is clearly not a commercial activity nor one contemplated by Congress when enacting the FSIA.

The rationale of *Berkovitz, supra*, as well as its restrictive interpretation was followed by the Ninth Circuit in *Australian Government Aircraft Factories* v. *Lynne*, 743 F.2d 672 (9th Cir. 1984), *cert. denied*, _____ U.S. _____ (1985), in dismissing a complaint for wrongful death. Here, the court extended its narrow approach to the loss of an aircraft owned by an American corporation, concluding that the "direct effect" of the faulty manufacture by the Australian Government was the crash of the plane in Indonesia. The court rejected the more liberal interpretation espoused by the Second Circuit in *Texas Trading and Milling Corp.* v. *Federal Republic of Nigeria, supra.*

The Second Circuit in *Texas Trading, supra*, held that a corporation can suffer only a financial loss. The relevant inquiry with regard to a corporation is therefore whether it suffered a direct financial loss in the United States. The court expressly reserved decision on whether a corporate financial loss abroad would constitute a "direct effect" in the United States.

That question was answered in the affirmative in *Matter of Rio Grande Transport, Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981), which involved a collision in the Mediterranean Sea between a vessel owned by an American corporation and a vessel owned by an Algerian government corporation. The district court, relying on *Texas Trading, supra*, found that the financial loss to Rio Grande Transport constituted a direct effect in the United States. The court then extended the application by finding that there was subject matter jurisdiction over the cargo claim of the Tunisian government as this grain had been purchased through the U.S. Government P. L. 480 program and the loss of the grain impeded American foreign policy objectives.

In the final analysis, the Ninth Circuit in *Australian Government Aircraft, supra*, has decreed, in essence, that a corporate plaintiff for FSIA purposes sustains a financial loss in the place where the loss occurs and not where the effect of that loss may be felt. Under this analysis there can be a direct effect in the United States only when the loss itself

occurs here. Since other sections of the Act are called into play when an act is performed in the United States, the "direct effect" language of the statute becomes completely meaningless.

The case at bar presents a set of facts similar to those involved in *Rio Grande Transport, supra.* The Yugoslavian government pledged its support to the United Nations Laotian Emergency Relief Fund and shipped a cargo of flour, beans and potatoes valued in excess of $2 million to Vientian, Laos, aboard the SS "TREPCA". The Laotian Relief shipment promoted the humanitarian objectives of the United States as well as those of the United Nations. The United Nations is located in New York and the financial impact of the cargo loss was felt there as well as at the New York offices of Yugoexport and of the Port Authority of Thailand.

Thus, all the *personae dramatis* were centralized in one jurisdiction. This fact, combined with the substantial financial impact of the cargo loss and the impairment of the foreign policy and humanitarian aims of the United Nations and the United States, constitute a direct effect in the United States and provide a jurisdictional basis under the FSIA.

2. Default of Foreign Sovereign Presents A Substantial Question Regarding Sovereign Immunity.

The FSIA is grounded on the proposition that clarity and consistency are particularly critical in relations with a foreign sovereign. Despite that clearly articulated principle, the courts have created great uncertainty as to what effect the default of a foreign state has on its defense of sovereign immunity.

In *Canadian Overseas Ores, Ltd.* v. *Compania De Acero Del Pacifico,* 727 F.2d 274 (2d Cir. 1984), the court held that a foreign sovereign may not securely withhold assertion of the immunity defense until a responsive pleading is filed as

the district courts have discretion to determine that the conduct of a party in litigation constitutes a waiver of foreign sovereign immunity in light of the circumstances of a particular case. The Ninth Circuit Court of Appeals held to the same effect in *Wolf* v. *Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984).

It is clear that the two circuits agree that a foreign state must assert this affirmative defense at an early stage of the proceedings lest it be lost. However, the Ninth Circuit has allowed the Royal Thai Government in the case at bar to preserve its defense despite the Thai Government's failure to appear or assert the defense on its own behalf *at any time.* This was not done in the initial proceedings, appeal was not taken from the judgment and no attempt was made to have the judgment set aside. This issue was first raised by Thai Airways, the government's alter-ego air carrier, in a collateral action to enforce the judgment. Despite the clear monitions of *Canadian Overseas* and *Wolf,* the Ninth Circuit allowed the collateral attack. The Government was not penalized in any way for its deliberate default. Yugoexport has carried the action through three court systems for seven years, only to have the Ninth Circuit determine that there has never been subject matter jurisdiction. Even now, the Thai Government had never appeared or filed an answer on its own behalf. The only attempt of Thai Airways to meet its Government's burden of proof was a plea of ignorance of the entire transaction.

The message issuing to a foreign sovereign is clear: "If you're liable, don't appear or answer an FSIA Complaint. Hold your American assets in the name of a government corporation. Respond only if those assets appear to be threatened, and then do so in the name of the 'innocent' corporation."

The principle enunciated in *Canadian Overseas* and in *Wolf* requires a foreign state to play by the rules in our judicial

system. The message expressed by *Yugoexport* is that the Second and Ninth Circuits didn't really mean what they said in *Canadian Overseas* and *Wolf*. It is critical that this issue be clarified in order to discourage default and to encourage assertion of the defense of sovereign immunity at the initial stages of the litigation.

CONCLUSION

This petition presents a question of interpretation of the "direct effect" clause of the FSIA and thus involves a significant, unresolved question of federal law which has not been previously addressed by this court. The resolution of the question will have significant impact in the law and in the international marketplace.

The opinion of the Ninth Circuit in the case below contravenes the goals and purposes of the FSIA. Instead of promoting uniformity and regularity in the area of sovereign immunity, it has created a dual system whereby a foreign state is amenable to suit in some areas of the United States, but immune in other areas. It is likely that different plaintiffs damaged as a result of the same transaction or occurrence, could be accorded different treatment against the same foreign state merely because they reside in or do business in different geographical areas.

The various formulations adopted by the circuit courts in interpreting the "direct effect" language of the FSIA is creating a body of law that is unclear and disputed. It was the intent of Congress to provide a uniform and unequivocal jurisprudence governing the rights, liabilities and immunities of foreign sovereigns brought before American tribunals under the FSIA. The guidance of this Court is sorely needed to avoid further widening of the chasm between these two jurisdictional philosophies.

The Ninth Circuit has recently held in *Yugoexport* that the affirmative defense of sovereign immunity is not waived or lost by failure to appear and answer or failure to take an appeal from a default judgment, and that the issue may be raised for the first time in a collateral action. This encourages default on the part of sovereigns, particularly where liability is most clear. It also encourages forum shopping since the Second Circuit continues to take the position that a sovereign withholds assertion of the defense at its peril.

For these reasons, a Writ of Certiorari should be granted.

DATED this 22nd day of March, 1985.

Respectfully submitted,

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HAGEN & MATERA

Francis Ralph Matera*

Counsel for Petitioners
Yugoexport, Inc., and
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**Counsel of Record*

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

YUGOEXPORT, INC. (JUGOEXPORT) AND INSURANCE INSTITUTION "NOVI SAD"

78 CIV 484 (WK)

Plaintiff

-against-

JUDGMENT

PORT AUTHORITY OF THAILAND

Defendant

----------x

A motion having been duly made by plaintiffs for assessment of damages and judgment by default and the default of the defendant, Port Authority of Thailand, having been noted by the Court, by judgment dated September 27, 1978, duly entered by the Clerk of this Court on October 5, 1978, and this Court having ordered and directed that the plaintiffs

herein, recover of the defendant, Port Authority of Thailand, the damages sustained by said plaintiffs and that an inquest be held before the Hon. Nina Gershon, United States Magistrate for the assessment of plaintiffs' damages and that, upon rendering of the Report and Recommendation by the aforesaid Hon. Nina Gershon, United States Magistrate, judgment be entered in accordance therewith;

And this case, having been regularly brought on for inquest on the 15th day of January, 1979, before the said Hon. Nina Gershon, United States Magistrate, after due notice thereof having been given to the said defendant, Port Authority of Thailand, and after hearing and considering the evidence and testimony offered by

plaintiffs and due deliberation having been had thereon, the said Hon. Nina Gershon, United States Magistrate, having rendered her Report and Recommendation, dated September 14, 1979, wherein it was held that plaintiffs have proven their total actual loss and damages, and that plaintiffs are entitled to a money judgment against the defendant, Port Authority of Thailand, in the total sum of $856,069.21, together with interest from August 2, 1976, at the rate of six (6) percent per annum as provided by law together with costs, and the Court, having approved and adopted the Report and Recommendation of the Hon. Nina Gershon, United States Magistrate, aforesaid on October 3, 1979, it is hereby,

ORDERED, ADJUDGED AND DECREED, that plaintiffs recover of the defendant, Port Authority of Thailand, the sum of $856,069.21, with interest at the rate of six (6) percent per annum from August 2, 1976, together with the sum of $899.94 as costs as annexed hereto.

Dated at New York, N.Y. this 3 day of October, 1979

/s/ Knapp
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YUGOEXPORT, INC. (JUGOEXPORT) and INSURANCE INSTITUTION "NOVI SAD",	)	CAUSE NO. MS82-68
Plaintiffs,	)	
vs.	)	AFFIDAVIT OF REGULARITY
PORT AUTHORITY OF THAILAND,	)	
Defendant.	)	
STATE OF	)	
	)	ss.
COUNTY OF	)	

FRANCIS R. MATERA, being duly sworn, deposes and says:

1. That I am an attorney at law duly admitted to practice before the Courts of the State of New York, the

United States District Court for the Southern District and Eastern Districts of New York, the United States Court of Appeals for the Second Circuit, the Supreme Court of the United States and a member of the firm of Crowell, Rouse & Varian, attorneys for Yugoexport, Inc. (Jugoexpert) and Insurance Institution "NOVI SAD." In addition thereto, I am a graduate of New York Law School and have been a practicing attorney for in excess of ten (10) years.

2. I make this affidavit to assure the Court that all the requirements of United States law have been complied with in plaintiffs' obtaining a judgment against the Port Authority of Thailand, an agency or instrumentality of the Royal Thai government and to further assure and

advise the Court that the Port Authority of Thailand received notice of all proceedings as required by United States law and that I was the attorney personally involved with the above matter.

3. The above captioned action was brought pursuant to the provisions of 28 U.S.C. Sec. 1330 and 28 U.S.C. 1602 et seq., "Foreign Sovereign Immunities Act of 1976", 90 State. 2892, Pub. L. 94-583.

4. That on February 1, 1978, a complaint was filed with the Clerk of the United States District Court for the Southern District of New York and a summons was issued as a result thereof. A translation of the original summons and the complaint from English into Thai was annexed to the original complaint together with

the affidavit of translation. Also, annexed to said original complaint was the Notice of Suit, in both the English and Thai languages, as required by 22 CFR Sec. 93 et seq., entitled SERVICE ON FOREIGN STATE together with, a copy of the "FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976" in further compliance with 22 CFR Sec. 93, et seq.

5. That on February 1, 1978, I addressed a letter to the Clerk of the above Court requesting the Clerk to serve the defendant pursuant to Rule 4(i)(I)(D) of the Federal Rules of Civil Procedure and pursuant to 28 U.S.C. 1608, at the addresses stated in said letter, a copy of which is annexed hereto as Exhibit B.

6. That in accordance with my request, the Clerk on February 3,

1978, served by mail copies of the documents referred to in paragraph 5 above on the Port Authority of Thailand as follows:

(a) Ministry of Foreign Affairs
Saransom Place
Bangkok, Thailand

(b) Port of Authority of
Thailand
Jlong Toey
Bangkok, Thailand

(c) Secretary of State
Department of State
Washington, D.C.
Attn: Director of Special
Consular Service

7. That there was delivered to the United States Marshal's office, Civil Division for the United States District Court, Southern District of New York, the original Summons together with a full and complete set of documents referred to in paragraph 5 above requesting that the Marshal's office effect personal service on the Port Authority of

Thailand by serving same on the Office of Commerce Counselor, Royal Thai Embassy, 5 World Trade Center, New York, New York 10048. Personal service was made on February 9, 1978.

8. On April 26, 1978, I received a Notice of a conference before Judge Whitman Knapp the United States District Judge assigned to the case, scheduling a pre-trial conference for May 30, 1978 in Courtroom 506 at 4:00 p.m.

9. On April 28, 1978, I directed three letters as follows:

(a) Registered mail, return receipt requested:

(I) Ministry of Foreign Affairs
Saronsom Place
Bangkok, Thailand

(II) Port Authority of Thailand
Jlong Toey
Bangkok, Thailand

(b) Certified mail, return receipt requested:

Office of Commerce
Counselor
Thailand Embassy
5 World Trade Center
New York, N.Y. 10048

In each instance, copies of the documents described in paragraph 5 above together with a copy of Judge Knapp's Notice of a Conference were annexed to said letters. Said letters suggested that the defendant take steps necessary to protect its interests.

10. The return receipt for Exhibit H was signed by the Office of Commerce Counselor, Thailand Embassy, on May 2, 1978.

11. On May 30, 1978, at 4:00 p.m., I attended at the conference before Judge Knapp and reported to the Court the defendant's default in

appearance and pleading and that your affiant had advised defendant of the instant conference. The defendant's default in failing to attend the conference either pro se or by counsel, was noted by the Court. At the conclusion of said conference, I was directed by the Court to advise the defendant of plaintiff's intention to make an application to the Court for default judgment.

12. On May 31, 1978, I directed a letter to each of the following by registered mail, return receipt requested:

(a) Ministry of Foreign Affairs
Saronsom Place
Bangkok, Thailand
(Registered No. 350548)

(b) Office of the Commerce
Counselor
Thailand Embassy
5 World Trade Center
New York, N.Y. 10048
(Registered No. 350549)

(c) Port Authority of Thailand
Jlong Toey
Bangkok, Thailand
(Registered No. 350547)

Said letter stated that counsel for plaintiffs attended the conference before Judge Knapp, referred to in counsel's letter of April 28, 1978 and further advised that unless defendant appeared by counsel that an application for judgment by default will be made to the Court on September 15, 1978 at 2:00 p.m.

13. The return receipts for the aforesaid were signed as follows:

Registered No. 350547 -
June 9, 1978
Port Authority of Thailand

Registered No. 350548 -
June 5, 1978
Ministry of Foreign Affairs

Registered No. 350549 -
June 1, 1978
Office of Commerce Counselor

14. That 28 U.S.C. 1608(d) of the "Foreign Sovereign Immunities Act

of 1976" provides that the defendant shall serve an answer within sixty (60) days from the date that service has been made.

15. That more than sixty (60) days expired and the defendant had not appeared or answered the complaint and was in default thereof.

16. No extension of time to appear, answer or otherwise move had been granted defendant.

17. The defendant continued in its failure to appear and answer the complaint, defaulted in appearing before the Court at the time of the scheduled conference and repeatedly failed and neglected to respond to my various letters.

18. The defendant has been advised of all the events which

transpired in the litigation and chose to remain silent.

19. That on June 20, 1978, I filed with the Clerk of the Court "A Request to Enter Default."

20. On June 28, 1978, a motion for judgment was made by plaintiffs returnable before Judge Knapp, on September 15, 1978.

21. On September 27, 1978, the default of the defendant, Port Authority of Thailand was duly noted by the Court and a judgment entered by the Clerk of the Court for the United States District Court, Southern District of New York, on October 5, 1978. Said judgment also provided that plaintiffs recover from the Port Authority of Thailand the damages sustained by them on account of the claimm for relief demanded in the

complaint together with interest and costs and sets forth that an evidentiary hearing will be held on January 5, 1979 at 2:00 p.m. before the Hon. Nina Gershon, United States Magistrate.

22. On November 17, 1978, I addressed a letter to the Clerk of the above Court requesting the Clerk to serve the defendant at the addresses stated in said letter and, that in accordance with my request, the Clerk on November 24, 1978, served by registered mail copies of the documents enumerated in paragraph 22 on the Port Authority of Thailand as follows:

(a) Ministry of Foreign Affairs
Saronsom Place
Bangkok, Thailand

(b) Port Authority of Thailand
Jlong Toey
Bangkok, Thailand

23. On November 21, 1978, Notice of Entry of Judgment and Clerk's Certificate was served on the Port Authority of Thailand both in English and Thai wherein it sets forth that an evidentiary hearing shall be held on January 15, 1979 at 2:00 p.m. as follows:

(a) Registered mail, return receipt requested:

(I) Ministry of Foreign Affairs
Saronsom Place
Bangkok, Thailand

(II) Port Authority of Thailand
Jlong Toey
Bangkok, Thailand

(b) Certified mail, return receipt requested:

Office of the Commerce Counselor
Thailand Embassy
5 World Trade Center
New York, N.Y. 10048

24. That there was delivered to the United States Marshal's office, Civil Division, for the above Court a copy of the documents set forth in paragraph 22 requesting that the Marshal's office effect personal service on the Port Authority of Thailand by serving same on the Office of Commerce Counselor, Royal Thai Embassy, 5 World Trade Center, New York, N.Y. 10048. Personal service was made on December 12, 1978 as set forth in the Marshal's return of service.

25. That this matter was brought on for an evidentiary hearing on January 15, 1979 before the Hon. Nina Gershon, United States Magistrate, after due notice thereof was given to the defendant, Port Authority of Thailand, and after hearing and

considering the evidence and oral testimony offered by plaintiffs, the said Nina Gershon, United States Magistrate, rendered her Report and Recommendation, dated September 14, 1979, wherein she held that plaintiffs have proven their total actual loss and damages, and are entitled to a money judgment against the defendant, Port Authority of Thailand, in the total sum of $856,069.21 together with interest from August 2, 1976 at the rate of six (6) percent per annum as provided by law together with costs.

26. That the aforesaid Report and Recommendation of the Hon. Nina Gershon, United States Magistrate was approved and adopted by Judge Knapp on October 3, 1979.

27. Thereafter, a money judgment in favor of plaintiffs against the

defendant, Port Authority of Thailand in the sum of $856,069.21 with interest at the rate of six (6) percent per annum from August 2, 1976 together with the sum of $899.94 as costs was duly entered on October 23, 1979.

28. On October 31, 1979, Notice of Entry of Judgment, both in English and Thail language, was served upon the Port Authority of Thailand as follows:

By registered mail, return receipt requested to:

(a) Port Authority of Thailand
c/o Ministry of Foreign Affairs
Saronsom Place
Bangkok, Thailand

and

(b) Port Authority of Thailand
Klong Toey
Bangkok, Thailand

By certified mail, return receipt requested to:

Port Authority of Thailand
Embassy of Royal Thai
Government
Thailand Embassy
Office of Commerce Counselor
5 World Trade Center
New York, N.Y. 10049

29. On October 31, 1979, I addressed a letter to the Clerk of the above court requesting the Clerk to serve the defendant at the address stated in said letter and, that in accordance with my request, the Clerk on about November 2, 1979, served by requested mail, return receipt requested copies of the documents set forth in paragraph 29 on the Port Authority of Thailand as follows:

(a) Ministry of Foreign Affairs
Saronsom Place
Bangkok, Thailand

(b) Port Authority of Thailand
Jlong Toey
Bangkok, Thailand

30. That on November 1, 1979, there was delivered to the United States Marshal's office, Civil Division, for the above Court a copy of the documents set forth in paragraph 29 requesting that the Marshal's office effect personal service on the Port Authority of Thailand by serving same on the Office of Commerce Counselor, Royal Thai Embassy, 5 World Trade Center, New York, N.Y. 10048. Personal service was made on November 2, 1979.

31. More than one year has expired since the Entry of Judgment and the Port Authority of Thailand failed to move to vacate or set same aside.

32. Based upon a review of all the proceedings heretofore had herein and upon a review of the applicable

law, statutes and rules, it is my opinion that all the requirements of the United States law have been observed and complied with and that notice of all proceedings as well as all papers were served upon the defendant herein.

33. In the opinion of affiant, all steps to obtain a valid and enforceable money judgment against the Port Authority of Thailand were taken and observed in accordance with the practice and procedures provided by United States law, statutes, rules of practice and procedure and that plaintiffs, YUGOEXPORT, INC. (JUGOEXPORT) and Insurance Institution "NOVI SAD" have a valid and enforceable money judgment against defendant, Port Authority of Thailand.

34. It is my further opinion that the Port Authority of Thailand is a wholly-owned agency of the government of Thailand which is liable under United States law for the debts and obligations of the said Port Authority.

/s/ Francis R. Matera
Francis R. Matera

SUBSCRIBED AND SWORN to before me this 1 day of Sept., 1982.

/s/ Francis J. Larkin
NOTARY PUBLIC in and for the State of New York, residing at: _____.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YUGOEXPORT, INC., et al.	)	
Plaintiffs,	)	No. MS82-68
v.	)	ORDER DENYING MOTION FOR WRIT OF GARNISHMENT
THAI AIRWAYS INTERNATIONAL, et al.,	)	
Defendants.	)	

Plaintiff brings this Motion for a Writ of Garnishment based upon a default judgment issued in the Southern District of New York. The underlying dispute arises out of a fire-loss to a shipment of grain which was en route from Beograd, Yugoslavia to Vientiane, Laos via the Port of Bangkok, Thailand. The shipper of the goods was Yugoexport, Inc., an agency of the Socialist Federal Republic of

Yugoslavia that maintains an office in New York city. The fire-loss occurred while the goods were being temporarily warehoused in Bangkok in facilities owned and operated by the Port Authority of Thailand. Because the assets of the Thai Government and the Port Authority are immune from execution in Thailand, Yugoexport now seeks to satisfy its judgment by garnishing the accounts of Thai Airways International here in Seattle.

Assuming, but without holding, that the District Court for the Southern District of New York had jurisdiction to enter the default judgment against the Port Authority of Thailand, it is apparent nonetheless that Plaintiff is not entitled to its requested Writ of Garnishment.

Sovereign Immunity

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330 and 1602-11 (1976) generally grants a foreign state immunity from suit in this country. 28 U.S.C. § 1602. A "foreign state" includes any "agency or instrumentality of a foreign state" including a corporation, a majority of whose shares is owned by the foreign state. 28 U.S.C. § 1603(a) and (b). The vast majority of Thai Airways' stock is owned by the Government of Thailand and, therefore, Thai Airways is a "foreign state" for purposes of the FSIA.

A foreign state may not have its assets attached in aid of execution upon a judgment except under limited circumstances. 28 U.S.C. § 1609. And Plaintiff contends that Thai Airways' assets are not immune from execution

if the judgment upon which Plaintiff sues "relates to a claim for which [Thai Airways] is not immune by virtue of section 1605(a)(2)." 28 U.S.C. § 1610(b)(2).

Plaintiff's argument fails because the exception to immunity contained in § 1605(a)(2) does not apply. That section states that a foreign state shall not be immune if an action against it is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Here, there is no nexus between the fire loss to the goods and the United States; there is no colorable "direct effect." The goods were being shipped from Yugoslavia to Laos by way of Bangkok,

Thailand. They were never in the United States nor were they destined for this country. The only relationship between the food shipment and the United States appears to be that the shipment was part of a United Nations program. The U.N., of course, is headquartered in New York City. Since there is no "direct effect" in the United States, Thai Airway's assets are immune from execution by virtue of 28 U.S.C. § 1609.

Corporate Disregard

Plaintiff also argues that since Thai Airways is virtually wholly owned by the Thai Government, this Court should disregard the airline's corporate status and find that it is "one and the same" as the Port Authority and the Thai Government. The law of corporate disregard

generally designates two requirements. First, there must be such a unity of interest in ownership between the corporation and its shareholders that the two no longer exist as separate entities. United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774, 777 (9th Cir. 1977). Second, the corporate form must be intentionally used to violate or evade a duty. Meisel v. M&N Modern Hydraulic Press Co., 97 Wash.2d 403, 645 P.2d 689 (1982). The mere fact that Plaintiff cannot obtain an adequate monetary remedy does not necessarily mean that there has been an injustice or that there has been corporate misconduct.

Here, neither of the two requisites for corporate disregard are sufficiently shown. While the vast majority of Thai Airways' stock is owned by the Thai Government, there

are a limited number of individual shareholders. There is no evidence whatsoever that the Government and these individual shareholders have disregarded the corporate form or treated Thai Airways as their alter ego. Moreover, there is no evidence that the shareholders intentionally used the corporate form to violate or evade a duty.

The underlying transaction involved in this case was a fire loss which occurred in Bangkok, Thailand. The goods destroyed had very little, if anything, to do with the United States and the Defendant in this proceeding had nothing whatsoever to do with the underlying transaction. Plaintiff's Motion for a Writ of Garnishment is, therefore, DENIED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED this 8 day of March, 1984.

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YUGOEXPORT, INC., (JUGOEXPORT) and INSURANCE INSTITUTION "NOVI SAD",	)	No. 84-3760
Plaintiffs-Appellants,	)	DC No. MS 82-68
v.	)	
THAI AIRWAYS INTERNATIONAL, LTD.	)	O P I N I O N
Garnishee-Defendant-Appellee.	)	

Appeal from the
United States District Court
for the
Western District of Washington
Walter T. McGovern, District Judge,
Presiding
Argued and submitted December 3, 1984

Before: BROWNING, CHIEF JUDGE, and GOODWIN and SKOPIL, Circuit Judges

PER CURIAM

Plaintiff Yugoexport appeals the denial of a writ of garnishment against Thai Airways International in

an action to enforce a default judgment entered in the Southern District of New York against the Port Authority of Thailand. Because the district court in New York had no jurisdiction of the subject matter under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, et seq., we affirm.

On May 25, 1976, Yugoexport, Inc. shipped goods to Vientiane, Laos, aboard the ship S/S TREPCA. The shipment of flour, beans and potatoes represented the Yugoslavian government's commitment to the United Nations emergency operation for Laotian relief. The goods were to be trans-shipped at Bangkok, Thailand, where the shipment was temporarily stored in a warehouse operated by the Port Authority of Thailand, an agency

of the Royal Thai government. A fire at the warehouse damaged the goods.

Yugoexport, an agency of the Yugoslav government, filed an action in the United States District Court for the Southern District of New York on February 1, 1978, against the Port Authority of Thailand, to recover the value of the destroyed goods. The Port Authority of Thailand has an office in New York and apparently was served. When the Port Authority failed to appear, a default judgment was entered in favor of Yugoexport in the amount of $856,069.21, plus interest.

In an effort to collect on its default judgment, on June 24, 1982, Yugoexport registered the judgment in the United States District Court for the Western District of Washington,

and filed a motion for a writ of garnishment pursuant to R.C.W. § 7.33.010(c) and Fed. R. Civ. P. 69(a). The motion sought garnishment of assets of Thai Airways International, Ltd., which has assets in Seattle. The Royal Thai government owns virtually all the shares of Thai International stock.

The District Court for the Western District of Washington denied the motion for writ of garnishment, holding, inter alia, that Thai International was immune from suit under the Foreign Sovereign Immunities Act because none of the Act's exceptions to immunity applied. See 28 U.S.C. § 1605(a). The court assumed, without deciding, that the Southern District of New York may have had subject matter jurisdiction over

the Port Authority of Thailand, but nevertheless held that Thai International's assets were immune from execution on the judgment against the Port Authority. 28 U.S.C. § 1609.

The Foreign Sovereign Immunities Act provides a comprehensive scheme for obtaining jurisdiction over foreign governments and their instrumentalities. Based upon well-established principles of international law, sovereign immunity is denied (and federal jurisdiction available) for the commercial activities of foreign governments in the United States. See generally, Wright & Miller, Federal Practice & Procedure: Civil § 1111. Jurisdiction in this dispute is allegedly based upon 28 U.S.C. § 1605(a)(2) which

permits federal jurisdiction in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). No party has seriously challenged that the actions of the Port Authority of Thailand involved commercial actions outside the United States. At issue, therefore, is whether the damage to the Yugoexport goods in Bangkok, Thailand, had a direct effect in the United States within the meaning of § 1605(a)(2).

Courts of appeals have announced widely varying definitions of the scope of the "direct effect" language

of § 1605(a)(2). See Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 200 (5th Cir. 1984); Gilson v. Republic of Ireland, 682 F.2d 1022, 1027-28 (D.C. Cir. 1982); Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 310-13 (2d Cir. 1981); Sugarman v. Aeromexico, Inc., 626 F.2d 270, 272-73 (3rd Cir. 1980); In the Matter of Rio Grande Transport, Inc., 516 F.Supp. 1155, 1164 (S.D.N.Y. 1981).

In Australian Government Aircraft Factories v. Lynne, 743 F.2d 672 (9th Cir. 1984), this court adopted a very restrictive interpretation of the § 1605(a)(2) "direct effect" language. That interpretation requires that either an injury or an act occur in the United States for jurisdiction to

exist. Id. at 674-75. We need not decide the limits of Australian Government or the proper limits of "direct effect" jurisdiction because any possible nexus to the United States of the Yugoexport loss of foodstuffs in Bangkok is far less than the nexus in other cases where this court has found no jurisdiction under § 1605(a)(2). See Australian Government, 743 F.2d at 674 (plane crash in Indonesia which resulted in death of American pilot and property loss to American corporation had insufficient nexus between the United States and act of the Australian government); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 332 (9th Cir.), cert. denied, ___ U.S. ___, (Nov. 26, 1984) (No. 84-484) (death of American in political

violence in Iran did not have sufficient direct effect in the United States).

Accordingly, the district court properly denied the writ of garnishment for lack of subject matter jurisdiction.

The order of the district court is affirmed.